IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 311 of 2003

WITH

CIVIL APPLICATION No 6489 of 2003
CIVIL APPLICATION No 1212 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANOJBHAI RAVJIBHAI RADADIYA & ANOTHER

Versus

KESHAVLAL DAYARAM DHANANI & OTHERS

Appearance:

1. Appeal from Order No. 311 of 2003 & C.A. 6489 OF 2003.
MRS KETTY A MEHTA for Petitioner No. 1-2
MR KK TRIVEDI for Petitioner No. 1-2
MR DHAVAL D VYAS for Respondent No. 1

2. Civil Application No. 1212 of 2004
MR CG SHARMA with Mr. D.D. Vyas for Applicant.
MR KK TRIVEDI WITH MRS. KETTY A MEHTA
for Respondent No.1.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 15/06/2004

CAV JUDGEMENT

This Appeal From Order is filed by the present appellants - original defendant Nos.4 & 5 against the order passed by the 3rd Joint Civil Judge (S.D.), Surat on 28.08.2003 below an application Exh.78 in Special Civil Suit No. 217 of 1999 whereby the learned Trial Judge has granted the interim relief in favour of the present respondent No.1 - original plaintiff as prayed for in para 8 (1) of the injunction application Exh. 78, till the final disposal of the suit. The learned Trial Judge has restrained the respondent Nos. 4 & 5 from transferring suit scheme/property to any other person and prevented them from disturbing the possession of the respondent No.1 as found from the order passed below Exh. 5.

2. The brief facts giving rise to the present Appeal From Order are that Special Civil Suit No. 217 of 1999 was filed by the present respondent No.1 for specific performance of agreement of sale dated 28.04.1984. The said suit was filed by the respondent No.1 only against late Shri Baldev A. Parmar, Rajendrasinh A. Parmar and late Vikramsinh B. Parmar, the original defendant Nos.1,2,3. The agreement of sale dated 28.04.1984 was in respect of Revenue Survey No. 124/1 paiki 23,775 Sq. Mtrs. and Revenue Survey No.125-A paiki 10,522 Sq. Mtrs. in all 34,297 Sq. Mtrs. and the amount of Rs.45,000/- in cash and cheque of Rs.10,000/- were paid in the year 1984, as against the total consideration of Rs.6,17,348/- which was agreed to be paid as the price of 34,297 Sq. Mtrs. land. The possession of the suit land was also alleged to have been given to the present respondent No.1. It is stated that on 14.07.1998, original owners entered into an irrevocable Power of Attorney in favour of the present appellant No.1-original defendant No. 4 giving him full authority to enter into transactions and to carry out any action for permission regarding Survey No. 124/1 of village Dabholi, Tal. Choryasi, Dist. Surat which was the land admeasuring 23,775 Sq. Mtrs. The possession of the said land was said to have been handed over on the same day i.e. 14.07.1998. The present suit was filed by the present respondent No.1 against the original owners of Survey No. 124/1 without joining all the owners of the land. On 28.07.1999, the present appellants gave an application for development permission and paid deposit for such permission as power of attorney holder of the original

owners of Survey No. 124/1 of village Dabholi. Thereafter, on 10.09.1999, the Regd. Sale Deed was entered into between the present appellants and the original owners of Survey No. 124/1. After the execution of the Sale Deed in favour of the present appellants, the present appellants paid development charges to the Surat Urban Development Authority to the extent of Rs. 2,48,860/- on 24.03.2000. The present appellants have also paid water deposit of Rs. 49,945/- and Rs. 40,675/- as security deposit on 01.04.2000. Pursuant to the application made by the present appellants for development permission, the Surat Municipal Corporation approved the development plan on 05.05.2000 in respect of the land bearing Revenue Survey No. 124/1 of village Dabholi.

3. Since the present respondent No.1 has filed injunction application Exh.5 in Special Civil Suit No. 217 of 1999, the same was heard and injunction was granted on 28.08.2000 against the original owners of the land bearing Survey No. 124/1 of village Dabholi who were the original defendant Nos.1 to 3 in the said suit. Even on that day, the fact that the present appellants have already purchased the land by Regd. Sale Deed and have also obtained development plan duly approved by the Surat Municipal Corporation for construction of a building over the land, was not declared before the Court. It is the say of the present appellants that they were not aware about any order passed below application Exh.5 as the original owners never informed the present appellants about the same and the present appellants as owners started further development of the land. For the purpose of development of land, the present appellants have levelled the land and roads were laid out on Survey No. 124/1, trees were also planted and payments were made on 14.10.2000. An application for supply of water to the local authority was made in October, 2000 and an application for obtaining non-agriculture permission for construction of building was also moved to the appropriate authority. The appellants have also paid amount for removing encumbrance over the land and Certificate by Deputy Collector of Agriculture was given to the appellants to this effect. The appellants have further paid conversion tax amounting to Rs. 2,55,965/- on 19.12.2000 and also paid Rs. 15,358/- for special assessment as per the demand of the District Collector made on 27.11.2000.

4. It is the case of the appellants that they have received notice on 05.01.2001 from the District Collector stating therein that objections regarding their

application for non-agriculture use of the land bearing Survey No. 124/1 were filed by the respondent No.1 and hearing was kept on 15.01.2001. On that date, the appellants remained present and they were informed by the District Collector that one Mr. Amratlal Dhanani has filed a suit and obtained some orders against the original owners. The appellants on inquiry for the first time found that some order was obtained against the original owners after the Regd. Sale Deed was entered in favour of the present appellants. The order obtained against the original defendant Nos.1 to 3 was not effective since 10.09.1999. The original owners have no title on the land and were not in possession of the suit land. On 17.01.2001, the Circle Officer sent a report to the District Collector pertaining to the application of the present appellants for non-agricultural permission, stating therein that the appellants are in possession of the suit land. On 22.02.2001, the appellants were asked to pay Rs.1,00,000/- towards the laying down of pipeline by the Surat Municipal Corporation and the said amount was paid by the appellants. On 27.04.2001, the appellants found the papers of Special Civil Suit No. 217 of 1999 from the file of Civil Judge (S.D.), Surat and it was apprehended by the appellants that the original owners who were joined as defendant Nos. 1 to 3 might be in collusion with the original plaintiff as the original defendants did not point out the fact regarding Regd. Sale Deed with the appellant and also the formalities performed by the present appellants.

5. The appellants, therefore, preferred Civil Application No. 563 of 2001 for leave to file appeal an Appeal From Order Stamp Number 258 of 2001 before this Court against the original plaintiff and original defendant Nos.1 to 3, challenging the order of interim relief passed by the learned Civil Judge (S.D.), Surat below an application Exh.5 in Special Civil Suit No. 217 of 1999. The appellants have disclosed all the facts and contended that no injunction could have been granted against the original defendant Nos.1 to 3 who had lost title with effect from 10.09.1999 and who never disclosed the fact regarding the said Sale Deed till the interim relief was granted on 29.08.2000. In the said Appeal From Order, it was pointed out by the respondent No.1 that they filed application Exh.64 to join the present appellants as party - defendants and that they would apply for necessary order of injunction against them. The Appeal From Order preferred by the present appellants was, therefore, withdrawn with a view to appear before the lower Court in Special Civil Suit No. 217 of 1999 and to submit their case before the lower court.

6. The application to join the present appellants was filed on 29.06.2002 and the present appellants filed their reply along with list Exh.74 producing several documents on record of the trial court. The present appellants have also produced Commissioner's report in R.C.S. No. 121 of 2002 filed by the present appellants against the present respondents in which the possession of the present appellants was clearly shown. The present appellants have also produced schedule with Exh. 105 which was a reply to the amended plaint showing 134 plot holders who were already allotted plots and who have already built their tenaments over the said plots. Despite the above facts, the learned Trial Judge has given a finding regarding possession of the lands in question with the present respondent No.1 and the impugned order below an application Exh.78 was passed by the learned Trial Judge granting interim injunction in terms of para 8 (1) of the said application till final disposal of the suit.

7. Being aggrieved by the said order, the present Appeal From Order is filed before this Court.

8. Mrs. Ketty A. Mehta with Mr. K.K. Trivedi, learned advocates appear for the appellants and Mr. Dhaval D. Vyas with Mr. D.D. Vyas, learned Senior advocate appear on caveat on behalf of the respondent No.1. After hearing the parties, the Court has passed an order on 15.09.2003 directing the parties to maintain status-quo as on that day qua the possession and title of the land in question. The Court has clarified on 10.10.2003 that the ad-interim relief granted to maintain status-quo was binding to both the parties and both the parties were directed to maintain status-quo qua possession and title of the property and should not make any attempt to execute the order under challenge in any manner whatsoever. The said interim relief was thereafter continued from time to time till the matter was heard and kept for order.

9. During the pendency of this Appeal, the present respondent No.1 - original plaintiff has moved Civil Application No. 1212 of 2004 for initiation of contempt proceedings against the opponents for having disobeyed the order of the Trial Court as well as of this Court. The respondent No.1 has also prayed for in the said application to adequately punish the opponents for any one or more of them who are found guilty of disobedience of the order of the learned Trial Judge as well as of this Court. A prayer was also made for appointment of

the Court Commissioner with a direction to prepare a Panchnama showing the position of construction on the site under Police protection and to submit a detailed report to this Court in that behalf. By way of interim injunction, the respondent No.1 has prayed that the opponents be restrained from putting up any construction whatsoever or from completing the work on the site in question and also from transferring any of the units constructed or to be constructed on the suit land and from completing the transactions of transfer, if any and handing over possession of the units constructed on the said land to the persons to whom they are already transferred in the meanwhile or from creating any interest of the third party on the suit land or any part thereof during the pendency of the suit before the Trial Court.

10. This Court (Coram :- D.A. Mehta, J.) has issued rule in the said application on 23.02.2004. Mrs. Ketty.A. Mehta, learned advocate has waived service of rule on behalf of opponent Nos. 4 & 5. D.S. was prayed for qua opponent Nos. 1 to 3. The Opponent Nos.1 to 3 were not served till this date and the said application was ordered to be heard along with this appeal.

11. As far as A.O. No. 311 of 2003 is concerned, Mrs. Ketty A. Mehta, learned advocate appearing for the appellants has submitted that the Regd. Sale Deed was executed in favour of the present appellants much prior to the order of the Trial Court issuing injunction against the original owners on 29.08.2000 and, therefore, the said order could not have been relied upon for the purpose of binding the appellants by the said order. Inspite of the registration of Sale-deed, the present appellants were neither joined as defendants nor any interim relief was obtained against them till the order dated 28.08.2003 was passed by the Trial Court below an application Exh.78. She has further submitted that even on 28.08.2003 when the impugned order was passed by the learned Trial Judge, 134 plot holders were in possession of various plots of Survey No. 124/1 and these 134 plot holders have put up construction over the said plots. The present appellants were not aware at all about filing of the Special Civil Suit No. 217 of 1999, till in the proceedings before the Collector for permission for non-agriculture use, it was pointed out that the objections were filed and one Amratlal Dhanani, as Power of Attorney Holder of Keshav Dhanani had filed the suit. She has further submitted that though the objections were filed before the Collector by and on behalf of the present respondent No.1 in January, 2001, no steps were

taken to join the present appellants in the said suit till the application Exh.64 was filed in June, 2002 and no injunction was obtained against the present appellants till 28.08.2003. The appellants had, in the meanwhile, completed all the formalities with the Surat Municipal Corporation and got their plans sanctioned, allotted plots to 134 persons whose names were disclosed in the present suit and construction was also carried out. As against the agreement of sale dated 28.04.1984 in favour of the present respondent No.1 which was not acted upon till 1999, the present appellants have become owners and the persons in possession of the suit land by virtue of the Regd. Sale Deed dated 10.09.1999 which has prima facie proved the title of the present appellants to the suit property.

12. She has further submitted that Special Civil Suit No. 217 of 1999 filed by the present respondent No.1 is hopelessly time barred as it was filed after the period of 15 years and no actions were taken during the said period. This fact itself shows that there was no intention on the part of the respondent No.1 to comply with the said agreement of sale. Even after the execution of Regd. Sale Deed on 10.09.1999, the present appellants were not joined as parties and no relief was claimed against them for more than three years and, therefore, the relief claimed against the present appellants was also barred by the doctrine of delay and laches. The learned Trial Judge should not have granted any interim relief in the suit which is barred by limitation. She has further submitted that the balance of convenience was not in favour of the respondent No.1 original plaintiff. On the contrary, it was in favour of the appellants as between the period from 10.09.1999 to 20.08.2003, the present appellants had obtained all permissions from the local authority and they had made several payments for conversion tax, special assessment charges for water connection, payment to local authority for laying down of pipelines and they have already handed over plots to various individuals who have built up their houses on the said land. As per the settled legal position in law, after a long time, no relief for specific performance of contract can be granted and the plaintiff will be entitled only to the compensation claimed by him. In the case where third parties' rights are created before any injunction is obtained, no relief of specific performance can be granted in favour of the plaintiff.

13. With regard to her contention that the suit filed by the plaintiff is hopelessly barred by limitation, she

relied on the decision of the Hon'ble Supreme Court in the case of K.S. VIDYANADAM AND OTHERS V/S. VAIRAVAN, AIR 1997 S.C. 1751 wherein it is held that "The rigour of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. While exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time limits for taking steps by one or the other party, it must have some significance and that the said time limits cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties.)

14. She has further relied on the decision of the Hon'ble Supreme Court in the case of NIRMALA ANAND V/S. ADVENT CORPORATION PRIVATE LIMITED AND OTHERS, 2002 (8) S.C.C. 146 wherein it is held that ordinarily, the plaintiff should not be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others be taken into account for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.

15. She relied on the decision of this Court in the case of LALUBHAI HIRABHAI PATEL AND ANOTHER V/S. INDO-JAPAN INDUSTRIES AND OTHERS, 2001 (1) G.L.H. 77 wherein the Court has taken the view that in view of Article 54 of the Limitation Act, the suit for specific performance of contract after 11 years from the date of issuance of notice regarding refusal of performance by the defendant and where no date of performance fixed in the agreement, the suit is barred by limitation and in such a suit, the Trial Court should not have granted any interim injunction.

16. She has further relied on the decision of this Court in the case of VEETRAG HOLDINGS PVT. LTD. V/S. GUJARAT STATE TEXTILE CORPORATION LIMITED, 1996 (1) G.L.H. 179 wherein it is held that even if the plaintiff cannot be non-suited on the ground of limitation, inasmuch as their suit is within time. However, when it comes to grant of equitable relief when the suit is filed after such a lapse of time, it cannot be said that the remedy of interim injunction was the necessary remedy and there was no remedy available to the party concerned in this behalf.

17. She has further relied on the decision of the Hon'ble Supreme Court in the case of MANJUNATH ANANDAPPA URF SHIVAPPA V/S. TAMMANASA AND OTHERS, 2003 (10) S.C.C. 390 wherein the plaintiff filed the suit almost after six years from the date of entering into agreement of sale. He did not bring any material on record to show that he had ever asked the defendant, the owner of the property, to execute a deed of sale. He filed the suit only after he came to know that the suit land had already been sold by him in favour of the appellant. Further more, it was obligatory on the part of the plaintiff for obtaining a discretionary relief having regard to Section 20 of the Act to approach the Court within a reasonable time. The Court held that having regard to this conduct, the plaintiff was not entitled to the discretionary relief.

18. She has further relied on the decision of the Hon'ble Supreme Court in the case of VEERAYEE AMMAL V/S. SEENT AMMAL, AIR 2001 SUPREME COURT 2920 wherein after referring to the Constitution bench decision of the Hon'ble Supreme Court in the case of CHAND RANI (SMT.) (DEAD) V/S. KAMAL RANI (SMT.) (DEAD) BY LRS., 1993 (1) S.C.C. 519, the Hon'ble Supreme Court has held that in case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case.

19. Mrs. Ketty A. Mehta, learned advocate appearing for the appellants has further submitted that the suit was not registered with the registering authority and hence, the doctrine of lis pendence is not applicable.

Section 18 of the Registration Act, 1908 deals with documents of which registration is optional. In its application to the State of Maharashtra, in Section 18, clause (ee) was inserted by Bombay Act, 14 of 1939 read with 35 of 1956. Clause (ee) states that notices of pending suit or proceedings referred to in Section 52 of Transfer of Property Act, 1988. Section 2 of Bombay Act, 14 of 1939 as amended by Bombay Act, 17 of 1945 states that this Act shall apply to notices in respect of suits or proceedings which relate to immovable properties situated wholly or partly in the Greater Bombay with effect from such date as may be directed by the State Government in this behalf by Notification in the Official Gazette. The State Government, however, by similar Notification may direct that the Provisions of this Act shall apply to such notices relating to immovable properties situated wholly or partly in such other area as may be specified in the said Notification. By virtue of the Transfer of Property (Bombay Provisions for Uniformity and Amendment) Act, 1959, the provisions of the Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 which amended the Trnasfer of Property Act, 1882, in its application to the pre-organisation State of Bombay, are extended to and remained in force in that part of the State of Bombay to which they did not extend immediately before the commencement of the said Act, and, now, the Transfer of Property Act, 1882 is deemed to be amended accordingly also in that part of the State. On the basis of the changes made in this statutory provision, Mrs. Mehta has submitted that the doctrine of lis pendens has no application to the facts of the present case as even after bifurcation of the state of Bombay, if the property is situated in the State of Gujarat and filing of the suit in respect of that property is not registered with the registering authority, the doctrine of lis pendens has no application.

20. Mrs. Ketty A. Mehta has further submitted that both the documents, namely, agreement to sale and possession receipt on which heavy reliance was placed by the respondent No.1 - original plaintiff are bogus and concocted. The original defendants have also denied the execution of the said documents in their written statement. The respondent No.1 was having a criminal background and he was arrested on the charge of murder. The proceedings were reached upto the Hon'ble Supreme Court. With regard to Kabja receipt, she has submitted that Kabja receipt was said to have been executed on 05.07.1984 whereas the respondent No.1 was arrested on 28.06.1984 and he was still in Jail on that day. Thus,

the story of the execution of the Kabja receipt under which the possession of the suit property is said to have been handed over to the respondent No.1 is absolutely imaginery and unbelievable.

21. She has further submitted that the original plaintiff - respondent No.1 has never shown his willingness or readiness to pay the agreed price of the property in question. As a matter of fact, for the long span of 15 years, the respondent No.1 has not bothered about the suit property and it was only when all legal formalities were observed and the property was about to be sold, the respondent No.1 has filed the suit before the Trial Court on the basis of the false and concocted documents. The Trial Court has committed grave error in granting relief in favour of the plaintiff.

22. Mrs. Ketty A. Mehta has further submitted that the learned Trial Judge has wrongly inferred the knowledge of the present appellants Nos.1 & 2 regarding the suit merely on the ground that the appellant No.1 was the power of attorney holder of the original owners. The present appellants are the bonafide purchasers without notice in as much as since 1998, the appellant No.1 was working as power of attorney of the original owners and original owners have never disclosed the fact regarding the suit to the present appellants nor did they point out when application Exh.5 was decided against them. The conduct of the original owner certainly created a doubt regarding collusive nature of the present suit. All the owners of the suit land were not joined and only three of them were joined and subsequently, the applications were made to add heirs of the defendant No.3.

23. She has further submitted that the mandatory relief which completely allows the suit could not have been granted as the plaintiffs have not proved their prima facie case of possession and occupation of the suit land. As per the legal position of interim injunction, the defendant cannot be prevented from entering into suit premises as it would virtually amount to vacating of the suit premises. Under the guise of interim order, the plaintiff cannot be assisted by the Court to take possession which he could not otherwise have on the basis of the evidence produced before the Court.

24. Mr. D.D. Vyas, learned advocate appearing for the respondent No.1 has strongly supported the order passed by the learned Trial Judge and submitted that it requires no interference from this Court while exercising its appellate jurisdiction under O. 43, R. 1 of C.P.C.

The order granting injunction is discretionary one where normally the Court would not interfere in Appeal From Order. He relied on the decision of the Hon'ble Supreme Court in the case of WANDER LTD. AND ANOTHER V/S. ANTOX INDIA P. LTD. reported in 1990 (Suppl.) SCC 727, SMT. RAJNIBAI ALIAS MANNUBAI V/S. SMT. KAMLA DEVI AND OTHERS A.I.R. 1996 S.C. 1946, and in the case of SWARUPKUNVARBA BALVANTSINH UDAVAT V/S. PRATAPSINH NATHUSINH JADEJA, 41 (4) G.L.R. 3644.

25. Mr. Vyas has further submitted that there is no delay in filing the suit as the suit was filed on 22.06.1999 immediately after the order was passed by the Collector in March, 1999. The plaintiff was not aware about the execution of the sale deed. He has come to know only when the notice was issued on the defendants in the suit and in their written statement, it was disclosed that the sale deed has been executed in favour of the defendant Nos.4 & 5 by the original defendant Nos.1,2 & 3 on or about 10.09.1999. As a matter of fact, the said sale deed was registered in June, 2000 i.e. during the pendency of the suit. But this fact was also not disclosed. The defendant No.4 was the power of attorney of the original defendant Nos.1,2, & 3 and was transferee in his own name as well as in the name of his son. This conduct of the defendant Nos.4 & 5 disentitles them from challenging the impugned order of injunction against them. Mr. Vyas has further submitted that during the pendency of hearing of application Exh. 5, it has never been brought on record before the Court by the defendants that the suit property has been transferred by the defendant Nos.1,2 & 3 to the defendant Nos.4 & 5. The parties who have not come with clean hands before the Court, at their instance, the injunction is not required to be varied or vacated.

26. Mr. Vyas has further submitted that since the transfer of the suit property was effected during the pendency of the suit, in view of the provisions contained in Section 52 of the Transfer of Property Act, the said transfer is hit by principles of lis pendens. For this purpose, he relied on the decision of the Hon'ble Supreme Court in the case of NAGUBAI AMMAL AND OTHERS V/S. B. SHAMA RAO AND OTHERS, AIR 1956 S.C. 593 wherein it is held that when a suit is filed for maintenance and there is a prayer that it be charged on specified properties, it is a suit in which right to immovable property is directly in question, and the lis commences on the date of the plaint and not on the date of the decree, which creates the charge.

27. Mr. Vyas has further relied on the decision of the Hon'ble Supreme Court in the case of ANAND NIVAS PRIVATE LIMITED V/S. ANANDJI KALYANJI'S PEDHI AND OTHERS, AIR 1965 S.C. 414 wherein it is held that "the Legislature intended to make the Act applicable only to transfers of title to immovables only in areas where the litigants were sufficiently sophisticated to understand the importance of registration. As Bombay Act XIV of 1939 is intended to apply to the situs of immovable property not the Court proceeding, application of the rule of 'lis pendens' is, in respect of proceedings relating to immovable properties situated in certain areas, made conditional upon the registration of the notice of the pendency of the suit. The section in terms applies only to the notices in respects of suits or proceedings which relate to immovable property in the Greater Bombay Area, it does not apply to any suits in which property in Greater Bombay is not the subject matter in dispute. By the Proviso to Section 2 of the Act, it may be extended by the Provincial Government of notification to notices relating to immovable properties situate wholly or partly in such other areas as may be specified. No notification was however issued by the appropriate Provincial Government extending the Act to notices relating to immovable properties in areas outside Greater Bombay. Where the suit was filed in the Court of Small Causes at Ahmedabad the Act did not apply and the decree in the suit was binding on the transferee to whom the property in question was transferred pending the suit."

28. On the basis of the above judgments, Mr. Vyas has submitted that it is not necessary that the notice regarding the pendency of the suit is required to be registered. For this purpose, he has also invited the Court's attention to the observations made in Mulla's Transfer of Property Act (9th Edition). At page 367, it is observed that an amendment was declared by Bombay Act 57 of 1959 to be in force in the whole of the then recognised State of Bombay and is, therefore, in force in the whole of the present State of Gujarat and Maharashtra under Section 2 of the Bombay Act of 1939. However, the amended section only applies to immovable properties situated wholly or partly in Greater Bombay; but the State Government is empowered to extend its application to other areas by notification. A suit regarding immovable properties situated outside areas so notified is not, of course, affected by the amendment. In view of the amendment, the rule of lis pendens under Section 52 of the Act will operate in the notified areas provided the lis is registered in the manner required by the local

amendment. Mr. Vyas has alternatively submitted that the notice was also addressed to the Registering Authority about the pendency of the suit. When the transferees pendente lite are made parties to the proceedings, they are bound by the orders - interim or final, passed against their predecessors in title. In this connection, he relied on the decision of the Bombay High Court in the case of DIGAMBARRAO HANMANTRAO DESHPANDE V/S. RANGRAO RAGHUNATHRAO DESAI AND ANOTHER, AIR (36) 1949 BOMBAY 367 wherein it is held that "the rule of res judicata prevails over the doctrine of lis pendens and once a judgment is duly pronounced by a competent Court in regard to the subject matter of the suit in which the doctrine of lis pendens applies, that decision is res judicata and binds not only the parties thereto but also the transferees pendente lite from them." Mr. Vyas has further submitted that the order of injunction passed against defendant Nos.1,2 & 3 would be binding on the transferees even on the basis of principles of res judicata. For this purpose, he relied on the decisions of the Hon'ble Supreme Court in the case of RAJ KUMAR AND ANOTHER V/S. OFFICIAL RECEIVER OF THE ESTATE M/S. CHIRANJI LAL RAM CHAND, LUDHIANA AND OTHERS, reported in AIR 1996 S.C. 941, ARJUN SINGH V/S. MOHINDRA KUMAR AND OTHERS AIR 1964 S.C. 993 since they are legal representatives in view of devolution of interest under O.22, R.10 of C.P.C.

29. Mr. Vyas has further submitted that while considering the application under O.39, R.1 & 2, the Court has to consider the prima facie case and not necessary for the Court to examine the merits of the case as to ascertain whether the plaintiff is likely to succeed. It is enough if the plaintiff shows a fair question which can be decided at the trial. For this purpose, he relied on the decision of this Court in the case of ADANI EXPORTS LIMITED V/S. HINDUSTAN ORGANIC CHEMICALS LIMITED, 40 (3) G.L.R. 2759 wherein it is held that in order to make out a prima facie case, necessary for granting an interlocutory injunction, the plaintiff need not establish his title. It is enough if he can show that he has a fair question to raise as to the existence of right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question is disposed of. The Court must also, before disturbing any man's legal right stripping him off any of the rights with which law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. It is also held in this case that it is a well settled principle of law that what

the Court has to determine in granting injunction is whether there is a bona fide contest between the parties and when there is a fair and substantial question to be decided as to the rights of the parties in the suit, it is not necessary for the purpose nor is it right that the Court should further examine the question in dispute or anticipate the decision of the question in the suit itself."

30. Mr. Vyas has further submitted that the agreement of sale even during the pendency of the proceedings under the Urban Land Ceiling Act, would not bar the suit for specific performance in view of the judgment in the case of HER HIGHNESS SHANTADEVI PRATAPSINH RAO GAEKWAD V/S. SAVJIBHAI H. PATEL AND OTHERS reported in 1998 (2) G.L.R. 1521 wherein it is held that what is sought to be enforced through specific performance is not a right to purchase the land. What is sought to be enforced is the right to execute the scheme for construction of the dwelling units on the land in question or the members of the weaker section and to deal with such dwelling units later on in accordance with law, subject to the relevant provisions of the Act, rules or the conditions which may be imposed by the competent authority while sanctioning the scheme. There is no bar against the decree being passed for specific performance and it has also been made conditional subject to the grant of exemption.

31. Mr. Vyas has further relied on the full bench judgment of this Court in the case of SHAH JITENDRA NANALAL V/S. PATEL ISHVERBHAI AND OTHERS, 1984 (2) G.L.R. 1001 wherein it is held that a conditional decree for specific performance subject to exemption being obtained under Section 20 of the Urban Land (Ceiling & Regulation) Act, 1976 is permissible.

32. Mr. Vyas has further submitted that so long as permission is not obtained by the Vendors, there will not be any question of moving for specific performance. As soon as the order of Collector is passed in March, 1999, the plaintiff has filed the present suit. A notice was given offering them full payment which the original defendants did not agree. The very fact that the plaintiff has immediately filed the suit itself shows that the plaintiff was ready and willing to perform his part of the Contract and even today the original plaintiff is ready and willing to perform his part of contract. It will be established during the course of trial as to whether the plaintiff was ready and willing to perform his part of the contract. The plaintiff has

paid the substantial amount of Rs. 5,65,000/- out of Rs. 6,70,346/- and the possession was already handed over to the plaintiff and hence, the plaintiff should not be denied the interim relief only on the basis of delay in filing of the present suit. In any case, the present appellants who are transferees pendente lite cannot question the same.

33. Mr. Vyas has further submitted that the appellants have made the statement before this Court that they were not making any construction and according to them, they have already transferred the possession of the property and, therefore, they do not have any locus of continuing with this appeal. Their conduct of prosecuting with the appeal is such as if they have interest in the property. However their defence in CA No. 1212 of 2004 is that they have transferred the property and they are not in possession of the suit property. These two stands taken by the present appellants in two different proceedings are absolutely contradictory and in this view of the matter, the interim relief granted by the Trial Court should not be varied or vacated.

34. As far as Civil Application No. 1212 of 2004 is concerned, Mr. C.G. Sharma, learned advocate appearing for the applicant - original plaintiff has submitted that the same is filed against the opponents - original defendants under O.39, R.2A of the C.P.C. for committing breach of the orders passed by the learned Trial Judge as well as by this Court. He has further submitted that the opponents have acted malafide to defeat the valuable right of the plaintiff arising from the agreement of sale. Even if the order was passed by this Court in the Appeal From Order and Civil Application for interim relief on 10.10.2003, the opponents continued to act to the prejudice to the interest of the applicant. The opponents have continued their attempts to defeat the decree which may be passed by the Trial Court in the aforesaid suit either by hook or crook. The opponents have continued the construction of houses on the suit land by employing hundreds of labourers so as to see that the construction was completed and the houses and/or units were transferred to third parties before the Appeal From Order and the Civil Application for interim relief are finally disposed of by this Court. Once having committed breach of the order passed by the Trial Court as well as by this Court, the opponents have no right to defend the suit and if they were not restrained, the very purpose of filing of the suit would be frustrated and the applicant would be left high and dry. This Court should

take strict view against the opponents and they should be penalised for committing the contempt of this Court.

35. Mr. Sharma has further submitted that the opponents are head strong and very rich persons and holds influence with the police and political people. Despite the fact that several orders were passed by the Trial Court and by this Court, the opponents have not even slightly stopped themselves from proceeding further with the construction of the houses on the suit land. Not only this, but on the passing of the order by the learned Trial Judge or by this Court, the opponents have deliberately speed up the work of construction by employing more and more labour force on each occasion. Notwithstanding the order passed by this Court in the Appeal From Order and the Civil Application directing the parties to maintain status-quo qua possession and title of the land in question, the applicant has come to know that opponents have already transferred some of the units to third parties ignoring the order of this Court and also continued to transfer the units from time to time. This conduct on the part of the opponents amounts to disobedience or breach of injunction issued by the learned Trial Judge and also of this Court. The applicant has, therefore, earlier moved M.C.A. No. 146 of 2004 for initiating appropriate proceedings against the opponents under the relevant Provisions of the Contempt of Court Act. The Division Bench of this Court, however, while disposing of the said M.C.A. directed the applicant to approach the learned Single Judge by way of an application under O.39, R. 2A of the code and accordingly, the applicant has moved the present Civil Application requesting this Court to take appropriate action against the opponents as contemplated under O.39, R. 2A of the C.P.C. The prayers made in this application are required to be granted by this Court.

36. Mrs. Ketty A. Mehta, learned advocate appearing for the opponents has objected to grant any relief prayed for in this application. She has relied on the detailed affidavit-in-reply filed and the documents attached therewith. She has submitted that opponent Nos.4 & 5 who purchased the land by Regd. Sale Deed on 10.10.1999 were in possession of the suit land. The opponent Nos.4 & 5 have already allotted the said lands to various plot holders and have also entered into Regd. Sale Deeds in favour of 65 plot holders much before the interim relief was granted against them in the above suit. The Regd. Sale Deeds entered in favour of 65 plot holders are not only mentioned in the written statement Exh.105 but are also produced before the Trial Court under a list Exh.127

mark 1 to 65. No injunction was operating against opponent Nos.4 & 5 even after the application to join them as party was filed on 29.06.2002. The injunction application Exh.78 preferred against the opponent Nos.4 & 5 was filed on 15.02.2003 and the same was granted on 29.08.2003. The opponent Nos.4 & 5 have already made clear in their written statement Exh.105 filed on 02.05.2003 that as far as Survey No. 125 of village Dabholi is concerned, there are 134 persons residing in the tenaments built by them and their light bills were also produced. So far as Survey No. 124/1 of village Dabholi is concerned, it was clearly pointed out that by Regd. Sale Deed, the land was transferred to the plot holders and tenaments were already built by plot holders. Though exact details regarding the plot holders who were in possession and occupation were given and though the exact details of the plot holders in Survey No. 124/1 of village Dabholi with Regd. document No. and date were given, no application whatsoever was made for quite a long time to join the said plot holders as parties in the said suit. There was no injunction operating against the plot holders who have become owners by Regd. Sale Deed much prior to the interim relief granted on 28.08.2003 against the opponent Nos.4 & 5. The opponent Nos.4 & 5 have not committed any breach of the order passed by this Court and the application filed under O.39, R. 2A of C.P.C. deserves to be summarily rejected.

37. With regard to the above submissions made by Mrs. Mehta on the basis of the contentions raised in the affidavit-in-reply, Mr. Sharma, learned advocate appearing for the applicant - original plaintiff in rejoinder has submitted that the opponents have raised some of the contentions only with a view to cause prejudice to the applicant as merely because the criminal proceedings were initiated against Shri Keshavlal Dayalal Dhanani, he could not have been deprived of claiming or protecting the civil rights which have already been created in his favour by operation of law. That the question as to illegality or otherwise of the agreement would be decided by the learned Trial Judge on the final disposal of the suit and it is not relevant so far as the present application is concerned. By raising irrelevant contentions and narrating irrelevant facts, the opponents were trying to mislead this Court. The alleged Sale Deed was executed on 10.09.1999 i.e. after filing of the suit and this was done only with a view to see that the subject matter of dispute itself was destroyed and the suit filed by the applicant became infructuous. The opponent Nos.4 & 5, inspite of the knowledge about the pendency of the suit and application Exh.5, in respect of

the same subject matter of the dispute, proceeded to dispose of the suit land in favour of other parties and also executed Regd. Sale Deeds in favour of the plot holders between 29th January, 2002 and 28th August, 2003. This was done by the opponent Nos.4 & 5 in collusion with opponent Nos.1,2 & 3 only with a view to further destroy the very subject matter of the suit. The conduct on the part of the opponents is required to be viewed in the context of the facts stated and averments made in the Civil Application. The events narrated in the Civil Application in great details would clearly demonstrate the modus operandi adopted by the opponents of defrauding the applicant and/or depriving the applicant of his legitimate rights which had accrued pursuant to the agreement of sale in the year 1984. This Court should pass an appropriate order so as to protect the interest of the applicant in the suit land and also to avoid any further complications being created by the opponents who are out to destroy the very subject matter of the suit.

38. I have heard at length the learned advocates appearing for the respective parties in the Appeal From Order No. 311 of 2003 and Civil Application No. 1212 of 2004. I have also considered the orders passed by the learned Trial Judge below an application Exh.5 as well as application Exh.78 in Special Civil Suit No. 217 of 1999. Various documentary evidence produced by the respective parties before the Trial Court and copies whereof filed before this Court were also minutely examined. The authorities relied upon by the learned advocates appearing for the respective parties have also been considered. Several issues legal as well as factual were raised before this Court. The relevant contentions of the parties pertaining to these issues have been elaborately discussed in the foregoing paragraphs. The Court is, however, restrained from expressing any final opinion on these issues as the Special Civil Suit No. 217 of 1999 is still pending before the Trial Court and any opinion expressed here in this judgment is only of prima facie nature and it is made clear that in no way it can be binding on the Trial Court while finally disposing of S.C.S. No. 217 of 1999.

39. It is true that normally Court would not interfere or grant any interim relief in a suit filed after the period of about more than 15 years. However, Court's indulgence may sometimes be shown looking to the peculiar facts of the case on hand. Here in the present case, the Agreement of sale was entered into on 28.04.1984 and the possession receipt was executed on 05.07.1984. It is yet to be decided in the suit as to

whether the agreement of sale and possession receipt are genuinely executed or they are concocted or bogus one. The factual contentions raised by the parties cannot be gone into at this stage. At the same time, the Court cannot decide it merely on the assumption that the same are bogus and not genuinely executed. There is no doubt about the fact that the suit was filed in the year 1999 for specific performance of the agreement executed on 28.04.1984. The fact, however, remains that the Collector has granted permission in 1999 and soon thereafter, the suit was filed by the plaintiff on 22.06.1999. The original defendant Nos. 1 to 3 have executed the Sale Deed in favour of the defendant Nos.4 and 5 on 10.09.1999 and the Sale Deed was registered on 09.06.2000. It is also equally important to note that the present appellant No.1 has acted as Power of Attorney of the defendant Nos.1 to 3. It is difficult to believe that the Power of Attorney holder was not aware about the earlier agreement of sale executed by the original owners of the land in favour of the plaintiff. Even otherwise, the original owners should not have allowed the Power of Attorney to execute the sale deed in his own favour especially when the original owners were aware about the execution of the agreement of sale. It also appears from the record that no public notice was given prior to the execution of the sale deed. The execution of the sale deed on 10.09.1999, therefore, certainly raises some doubts and suspicions. It is true that the present appellants were initially not joined as parties in the S.C.S. No. 217 of 1999, but at the same time, they have also not moved any application before the Trial Court for their impleadment in the suit. It is only when application Exh.5 was decided and interim injunction was granted against the original owners of the suit land, they have challenged the said order before this Court in Appeal From Order (Stamp Number) No. 258 of 2001. However, the same was also withdrawn. The present appellants came to know about filing of the S.C.S. No. 217 of 1999 in January 2001 when they filed objections before the Collector. The appellants should not, therefore, have continued the development of the suit property nor they should have created any third party interest in the suit property. It is found from the record that construction was made subsequently and 134 plot holders were allotted plots during this period. It is, therefore, not just and proper to claim any equity on this ground.

40. The question regarding limitation and applicability of the principle of lis pendens are certainly having very vital effect on the outcome of the

suit. But at the same time, application Exh.5 was decided on 29.08.2000 and the injunction was granted against the original owners of the suit property. The said order was not disturbed and still holds the field. It is the say of the present appellants that on the date when the injunction was granted, the original owners have no title on the land and were not in possession of the suit land after 10.09.1999. The order passed below application Exh.5 was not challenged by the original owners and when an attempt was made by the present appellants to challenge the said order, they have not persued for getting the said order reversed. On the contrary, civil application seeking leave of the Court to challenge the said order was withdrawn and consequently, Appeal From Order was also disposed of as having been withdrawn. Subsequently, an application was preferred by the original plaintiff to implead the present appellants as parties in the S.C.S. No. 217 of 1999 and ultimately, the order was passed below Exh. 78 on 28.08.2003 granting injunction against them. Here also, the say of the present appellants are that by this time, the suit property was already sub-plotted and the same was transferred to different plot holders and they have carried out the construction. It has now come on record that all these plot holders are also sought to be joined as parties in the S.C.S. No. 217 of 1999 pending before the Trial Court. The Court finds some substance in the submission of Mr. Vyas when he has contended that there was apparent contradiction in the stand taken by the present appellants in two different proceedings, namely, in Appeal From Order as well as in Civil Application No. 1212 of 2004 as in Appeal From Order, the present appellants are contending that the suit property is validly transferred in their favour and they are in possession after 10.09.1999. They were injuncted by the Court on 28.08.2003 but before that the suit property was already sub-plotted and transferred to various plot holders. When they say that the original owners have no title on the land and were not in possession of the suit land after 10.09.1999, the same logic would equally apply to them also as on 28.08.2003, they have no title on the land and were not in possession and hence, the injunction granted on 28.08.2003 was of no consequence as per their submissions. Even otherwise, while opposing the said Civil Application No. 1212 of 2004, it is the say of the present appellants that they have not made any construction on the various plots allotted to the plot holders and they have themselves constructed and hence, they have not committed any breach of the order passed by the Trial Court as well as by this Court. The very fact that they are rigorously pursuing the present proceedings

itself proves that what they are contending before the Trial Court as well as before this Court are not absolutely true and correct. However, in absence of any specific finding to that effect by the Trial Court and the matter is still pending for trial, the Court does not think it fit and proper to decide this issue at this juncture. It is yet to be established as to when the properties were transferred, who have made construction, when how and in what manner the consideration was passed and the amount of construction was spent. All these issues can thread bear be examined and definite finding can be arrived at only after completion of the trial.

41. It is in the above background of the matter, the Court is of the view that the interest of justice would better be served if both i.e. Appeal From Order and Civil Applications can be disposed of by giving certain directions to the Trial Court. Accordingly, the Court hereby issues following directions to the Trial Court :-

[i] The Trial Court is hereby directed to decide and dispose of the Special Civil Suit No. 217 of 1999 as expeditiously as possible, preferably within a period of one year from the date of receipt of writ from this Court or from the date of receipt of certified copy of this order, whichever is earlier.

[ii] The Trial Court will examine the genuineness of the agreement of sale dated 28.04.1984 as well as the possession receipt dated 05.07.1984 in light of the rival contentions raised by the parties and will come to the definite conclusion about its execution, passing of consideration stated therein and the fact regarding handing over of possession of the property in question.

[iii] Special Civil Suit No. 217 of 1999 was filed on 22.06.1999 and the sale deed was executed on 10.09.1999 i.e. after about two and half months from the date of filing of the suit. The said Sale Deed was registered after nine months i.e. on 09.06.2000 and application Exh.5 was decided on 29.08.2000. All these dates are having very much significance and hence, the Trial Court is directed to examine as to whether the original owners were aware about the filing of the suit or as to whether the power of attorney executed by them in favour of the present appellant No.1 and the execution of Sale-deed on 10.09.1999 by the said Power of Attorney in his own favour

alongwith his son, was only with a view to get rid of the possible outcome of the S.C.S. No. 217 of 1999. The Trial Court is further directed to examine as to why the original owners have not defended the suit and the power of attorney holder has not appeared, despite the fact that the power of attorney holder is himself one of the transferees of the suit land and has executed sale deed on 10.09.1999. The Trial Court would come to a definite conclusion as to whether this transaction is real or a genuine or it is in the nature of fraud or collusion between the parties.

[iv] The Trial Court is further directed to bear in mind the discussion made hereinabove, with regard to the question of limitation as well as the applicability of the principle of lis pendens.

[v] The Trial Court is further directed to come to a definite conclusion as to whether and when the suit property was transferred and possession thereof was handed over by the original owners to the present appellants and in turn by the present appellants to the various plot holders. The Trial Court is further directed to examine as to on which date, the construction was started, when it was completed and under whose instruction and at whose cost the said construction was carried out. This direction is issued only with a view to arrive at the conclusion whether any breach was committed by the original owners and/or the present appellants.

[vi] Since the application is already moved by the original plaintiff to implead all the plot holders as parties in the pending suit, the Trial Court is directed to hear them and after considering the necessary evidence and materials produced before the Court, appropriate order may be passed in the matter.

[vii] It is made clear that if the Trial Court ultimately comes to the conclusion that the agreement of sale dated 28.04.1984 and possession receipt dated 05.07.1984 are the genuine documents, there may be a strong case for such presumption that the subsequent documents executed by the original land owners in favour of the present appellants and by the present appellants in favour of the plot holders were only with a view to defraud the original

plaintiffs and to deprive of their legitimate right and interest under the agreement of sale as well as the possession receipt. The Trial Court would mould the relief accordingly in the pending suit without being influenced by any equitable consideration or the subsequent changing hands of the suit property. Alternatively, it is open for the Trial Court to arrive at an amount of adequate compensation in lieu of the property sold and/or transferred.

42. In view of the aforesaid direction issued by the Court, the order of status-quo passed by this Court on 10.10.2003 with regard to possession and title of the property would continue till the final disposal of the suit. The impugned order is accordingly modified to the above extent. This Appeal From Order is accordingly disposed of in light of the aforesaid directions and observations.

43. In view of the disposal of this appeal, there will be no order in C.A. No. 6489 of 2003 and it is accordingly disposed of.

44. Since the fate of the C.A. No. 1212 of 2004 depends on the finding to be arrived at by the Trial Court while disposing of the S.C.S. No. 217 of 1999 and necessary directions are already issued, no order is required to be passed at this stage. Hence, C.A. No. 1212 of 2004 is also accordingly disposed of.

Sd/-

[K.A. PUJ, J.]

#Savariya#

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